IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-D-16

UNITED STATES OF AMERICA, ex rel JACK J. GRYNBERG,

Plaintiff(s),

vs.

PRAXAIR, INC. and NIELSON & ASSOCIATES, INC.,

Defendant(s).

FINDINGS AND CONCLUSIONS REGARDING GRYNBERG PROTECTIVE ORDER

ORDER ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

On September 20, 1999, I entered a Protective Order which prevented Jack Grynberg, the Relator ("Grynberg"), from obtaining access to Praxair's confidential and proprietary business and technical information. On March 1, 2000, I

denied Grynberg's motion for reconsideration, and Grynberg filed an Objection with District Judge Wiley Y. Daniel. On June 8, 2000, Judge Daniel conducted a hearing, and found that my ruling was supported only by "general conclusions." He has referred the case back to me for two purposes: (1) to clarify my rationale, and (2) to conduct an evidentiary hearing. *See* Judge Daniel's Order of 6-8-00 at 10.

Grynberg has designated himself as an expert in this case, and defendants have filed a motion to strike him as an expert. Grynberg's qualifications to serve as an expert will be resolved in a separate proceeding or order, and it is not my intention here to resolve that issue. However, the fact that Grynberg claims to be qualified to serve as an expert, and the fact that he asserts this as one part of his basis for seeking relief from the Protective Order, necessarily place Grynberg's qualifications at issue in this present proceeding. To the extent that I comment upon his qualifications as an expert, I do so only within the limited context of the Protective Order.

On May 24, 2000, I conducted a hearing at which time I received testimony from two witnesses: Grynberg, and Dale Vanderwal, Production Manager for defendant Praxair. The purpose of the hearing was to permit Grynberg, in particular, to present additional evidence in support of his claims that (a) the information which Praxair is protecting does not constitute trade secrets, (b) he does not present a threat of competition to Praxair, and (c) he personally must have access to all of the business and technical information in order to coordinate his own experts and the prosecution of his case.

Grynberg does not complain that Praxair has failed to produce its confidential and proprietary business and technical information. He complains that access to the information is limited by my Protective Order to his counsel and experts. However, Grynberg claims that his counsel and experts are

inadequate to the task. He asserts that because of his "unique educational background," he is the only person who possesses the knowledge and education which is necessary to understand the business and technical aspects of this case. Hearing Transcript of May 24, 2000, at 43 ("H.Tr."). He states that he has attempted to find persons who are as knowledgeable as himself, but he claims that the experts whom he contacted were "scared to testify" or were not qualified. Id. at 53 & 54.

Praxair has not resisted disclosure of its confidential information to the plaintiff side of the lawsuit. Instead, it has proceeded on the assumption that the Protective Order would prevent disclosure of the information to Jack Grynberg himself. Praxair argues that if Grynberg is not at this time a competitor with Praxair, he is situated by experience, knowledge and the possession of certain mineral holdings to become one. Praxair is willing for its trade secrets to be received and evaluated by Grynberg's counsel and experts, but is unwilling for someone who is situated competitively to receive the materials. Praxair argues that Grynberg should remain subject to the Protective Order because he has neither established that he is qualified as an expert, nor has he established that his need for the trade secrets outweighs the harm which would be suffered by Praxair in the event that the Protective Order is dissolved or modified.

In order to resist production of the information to Grynberg, Praxair must establish "that the information sought is a trade secret, and demonstrate that its disclosure might be harmful." R & D Business Systems v. Xerox Corporation, 152 F.R.D. 195, 196 (D.Colo. 1993); Centurion Industries, Inc. v. Warren Steurer, 665 F.2d 323, 325 (10th Cir. 1981). Once Praxair establishes that the information sought is trade secret information, or otherwise confidential, the burden shifts to Grynberg. He must establish "that disclosure of the trade secrets is both relevant and necessary." R & D Business

Systems, 152 F.R.D. at 197. Additionally, he must prove more than mere interest in the materials, and must show instead that he has a "substantial need for the information." Id. Finally, "the district court must balance the need for the trade secrets against the claim of injury resulting from disclosure." Centurion Industries, 665 F.2d at 325.

In Colorado, "'trade secret" is defined as commercial information relating to business which is secret and of value, and which the owner has treated confidentially. Id. *See also* C.R.S. 1986, § 7-74-102(4) and 1 8-4-408(2)(d). Grynberg argues that Praxair has no secrets to protect here because its own expert, Howard J. Herzog, stated in his report that "'the Walden plant employs processes that are well-known and frequently employed in the design of chemical plants that are entirely appropriate for the purification of carbon dioxide gas streams.'" Grynberg Memo. Brief Regarding Reconsideration at 7, quoting Howard Herzog report. Grynberg concludes, "the technology is well established and well known, not new or secret, and thus does not warrant the extreme, unusual and burdensome measure of an order that keeps such information from the complaining party in the case." Id.

Praxair admits that it uses certain technologies which are generally known in the CO_2 industry. However, Praxair's Production Manager, Mr. Vanderwal, states that it is the particular manner in which the technologies are employed by Praxair which renders them secret. Mr. Vanderwal stated, "Well, we don't want to share because of the - the design of the plant, the temperatures, pressures, the velocity through these vessels, and all the technical criteria that we would run to purify the CO_2." H.Tr. at 103. Outside of the presence of Mr. Grynwald, Mr. Vanderwal related several specific items which Praxair utilizes in its production of CO_2 gas for edible purposes and which Praxair seeks to protect as secret. See Id. at 111, Mr. Vanderwal stated that development of the processes at the

Walden plant required more than a year of trial and error efforts. Id. at 112.

Mr. Vanderwal testified that none of the major companies in the CO_2 industry shared this type of information. Id. at 105. In circumstances where individuals were permitted to tour the Praxair plant, Praxair sought to protect its trade secrets by requiring the parties to sign "secrecy agreements." Id. at 105.

I find that Vanderwal was credible in his testimony. Based upon his testimony, I find that the information which is at issue in the present dispute over the Protective Order is "trade secret" information.

Praxair asserts that Grynberg should not be allowed access to its trade secrets because Grynberg is either a competitor, or is situated in circumstances whereby he could become one. Grynberg denies that he is either a competitor, or that he has any interest in becoming one. I did not find Mr. Grynberg, or his protestations, to be credible.

As Praxair has noted in a number of its pleadings, this is an unusual qui tam case because Grynberg, as the Relator, is not an insider. He claims to have seen what he considers to be abuses by Praxair in the payment of royalties to the United States, and he claims that this lawsuit was initiated to correct those abuses. Because he is not an insider, Mr. Grynberg is apparently motivated in this case either by patriotic loyalty to the United States, or by a desire to make money. I see no evidence of patriotic fervor, and I conclude that his primary interest in bringing this action is money.

In his Complaint, Grynberg stated that he was an experienced "natural CO_2 gas producer," that he had "19 years of experience in the natural CO_2 gas industry," and that

Praxair's practice injured him as a competitor in the CO_2 gas industry, Compl. at ¶ 4, 6 & 9. In his testimony before me on May 24th, Grynberg spent the bulk of his testimony attempting to distance himself from any claims he may previously have made with regard to his experience and/or involvement in the CO_2 industry, adamantly proclaiming that he is not a competitor with Praxair.

I find from the totality of Grynberg's testimony that Praxair is warranted in its concerns with regard to Grynberg's desires for access to its trade secrets. I find that Grynberg has explored for CO_2 in the past, that he presently has interests in the McElmo Dome, which includes CO_2 production, and that he presently administers his family's holdings, which include holdings in companies which produce CO_2 gas. I am not persuaded by Grynberg's efforts to distance himself from involvement with CO_2 as a commodity which can yield profits for him in some form.

Grynberg can obtain profits from this case in two ways. One, he may win this case, and thereby obtain the percentage of the award to which he will be entitled as a qui tam relator. Two if he loses this case, he can use the information which he has obtained from it to attempt to gain some competitive advantage, either by setting himself up in the CO_2 industry, or perhaps by entering into a joint venture with others for the same purpose. I conclude from Grynberg's testimony, and from his manner and demeanor, that if he were to lose this case, and fail to gain the profit which lies in that direction, he would likely seek to gain some advantage, some monetary advantage, from learning the secrets to Praxair.

Having found that the information to which Grynberg seeks access is trade secret information, and having found that Grynberg himself is seeking the information, in part, to gain a competitive advantage, the burden shifts to Grynberg to

demonstrate that he has a substantial need for the information which outweighs Praxair's needs to exclude him from access. During the hearing of May 24, 2000, Grynherg argued that his need for access to the information is motivated by two facts: one, the fact that he is uniquely qualified by education and experience both to act as an expert in this case, as well as to coordinate the efforts of the other experts which he has designated, and, two, the fact that the experts he solicited are either unqualified or are afraid to testify. See H.Tr. at 49-53. Mr. Grynberg has not persuaded me with regard to either of these propositions.

Although Grynberg makes a number of broad and conclusory statements throughout his testimony with regard to his involvement in .the CO_2 industry over the past 20 years, he has provided no facts which reflect that he has any specific, technical knowledge about the processing of CO_2 gas. He had no such speciality in college, and even if he had, he received his degrees almost 50 years ago. He has published no papers on the processing of CO_2 gas. He has never worked in the CO_2 gas production industry, and he has "no experience in processing or purifying carbon dioxide gas." Id. at 84. At best, his testimony reflects that his knowledge of the CO_2 gas production industry is limited to three tours of factories other than Praxair. Id. at 40. In the context of this proceeding, Greenberg has not presented evidence which persuades me either that he is qualified to act as an expert, or that he is "uniquely qualified" such that he is the only person who can coordinate the prosecution of this case.

In addition to himself, Grynberg has designated 5 other individuals whom he claims are qualified to testify as experts in this case. The expert reports and the qualifications of those individuals are the subjects of motions to strike which have been filed by the defendants. However, Grynberg has failed to demonstrate that any one of the other five experts are not

qualified to oversee and coordinate the technical aspects of the case.

Grynberg states that he has looked for experts to testify, but, apparently overlooking the fact that he has designated five other persons as experts, he asserts that any experts "that may have come close, were scared to testify against [Praxair]." Id. at 53, I find this assertion by Grynberg to be incredible. When pressed, Grynberg indicated that he had talked to only one person who was allegedly qualified, and who, he claimed, expressed some fear of testifying, a person named Lou Phennsteil. During the hearing, I found Grynberg's claim to be far fetched. Although it forms no basis for my conclusion, I find more believable the information which Praxair learned following the hearing, that Phennsteil declined to get involved in this matter not out of fear of Praxair, but out of fear that Grynberg would try and use him in Grynberg's 78 other False Claims Act cases. Praxair Post-Hearing Brief at 25, n 17.

Grynberg has presented no facts or information which persuades me that he, and he alone, is the only person in the country who can supervise and/or coordinate the technical aspects of this case. Indeed, because I find that Grynberg is not himself qualified as an expert in the processing of CO_2 gas, I find that he personally has no need for the trade secret information which Praxair seeks to maintain as secret as to him. I conclude that Grynberg's stated needs for the information do not outweigh Praxair's needs to exclude him from access.

CONCLUSION

Having considered all of the testimony which was presented before me on May 24, 2000, and having considered all of the numerous briefs which have been submitted on

behalf of both Grynberg as well as the defendants, I find and conclude that Praxair is warranted in its assertion that, if he is granted access to Praxair's trade secrets, Grynberg will seek to gain competitive advantage from the information. I also find and conclude that Grynberg has failed to demonstrate that his needs for the information outweigh Praxair's needs to exclude him from access to it. I stand by my ruling that the Protective Order, as drafted, place.

Dated at Denver, Colorado, this day of: October 3, 2000

BY THE COURT:

O. Edward Schlatter
United States Magistrate Judge